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ABSTRACT

The paper addresses practical issues involved for building principals in mediating to determine the most "free appropriate public education" for handicapped children and avoiding due process hearings. Mediation is viewed as an ongoing process, and the harmful effects of legal battles over a child's placement or evaluation are noted. The paper warns against viewing mediation as a means of placating parents. Building prinicpals should be involved in decisionmaking to enhance the implementation of least restrictive placement. The importance of clear communication among parents, diagnosticians, special and regular educators, and other professionals is emphasized as one way to avoid difficulties. The use of third-party mediation as a last-chance effort before a due process hearing is described. (CL)

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MEDIATING EVALUATION AND PLACEMENT OF SPECIAL EDUCATION CHILDREN

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MEDIATING EVALUATION AND PLACEMENT OF SPECIAL EDUCATION CHILDREN

Introduction

Since the topic "mediation" only occupies 75% of a page in the draft of the New Mexico State Plan to enact Public Law 94-142 and 98-199 and the "Due Process and State Administrative Review Hearing Procedures" occupies 19 pages, we must examine which process nets the most for the welfare of children. The term mediation for the purpose of this paper shall mean "an act of intervention between parties at variance for the purpose of reconciliation, intercession." PL 94-142 and PL 98-199 do not require mediation before due process hearing; however, New Mexico is suggesting it as a step that should be attempted after any disagreement over an EAR recommendation and that it be used by local school officials. This requires a building principal to be the pivotal person in creating a mediating environment as opposed to structuring an adverse posture over a disagreement about a child's evaluation or placement in special education. This paper shall address pragmatic points of view and guidelines building principals must recognize in mediating the most FAPE for special education children. Also, mediation shall be considered an ongoing process and not the end-all just to placate parents to avoid future legal problems.

Negative Effects of Creating a Legal Situation Over a Child's Placement or Evaluation

A professional responsibility to mediate a child's placement and evaluation is cast in PL 94-142 in the comments section on Impartial Due Process hearings. (1) It is pointed out that mediation can lead to solutions without creating adversarial relationships and emotional stress. The irreparable damages of interpersonal relationships over "courtroom-like" proceedings can only be assessed in mental health terms and not in dollars and cents. Regardless of who wins the proceedings, the fallout comes to the child in forms of resentment, possible misplacement, and feelings of rejection once the legal gavel has fallen. Mediation decisions, without legal overtones, are kept open and flexible which come closer to keeping the term "appropriate" in perspective. Court or hearing-officer decisions have a tendency to develop a permanent and long-lasting effect on a placement or evaluation which in turn may not meet the changing needs of the child. A legal rendering may cause professional staff or parents only to say, "We won," and not really consider the child's needs.

Turnbull and Turnbull (1978) naively refer to due process as a new principal--calling it "shared decision making" in the education of a handicapped child. (2) I believe mediation, developed properly, can more adequately equate with the cooperation and sharing needed to structure a meaningful education for a child who is obviously in need of interpretation to his or her parents and the professionals. The proper interpretations are not forthcoming when one is put under oath and only selective questions are asked to prove a point. Free flowing dialogue in mediation can produce more creative approaches than solutions evolving from stilted lines of questioning in official hearings.

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If mediation is to be used in agreeing to a placement change, an open-ended schedule can be followed in trying new approaches to the placement and again reviewing it at a later date. Parents and administrators then need not rest on a processing rush such as imposed by a 45-day time line with possible extensions and reviews at the state level. (3) The ominous clock that guides too many administrators causes errors in judgment and even convoluting data in order to make a deadline for a hearing. The workings of statements for a hearing sometimes receive clever designs to hide the truth and perhaps a realistic interpretation of a child's evaluation. This factor, coupled with meeting a time deadline in fear of the entire matter being dismissed, causes aberrations that do not meet the responsibility of arriving at the FAPE as required in the public laws.

There seems to be an inherent problem in the teaching profession in that we develop immediate disdain for parents who question decisions that we as professionals make and are unwilling to discusss. This arrogance cannot be tolerated under PL 94-142 and PL 98-199, because parents can go to due process and end up winning judgments against a school district for punitive damages. By professionals rebuffing parents who want information about their child and ask for reconsideration of placement, a posture of "let's get an attorney" is fostered in the parents. If an attorney enters the scene, he or she provides a security for the parent but puts the educator at a great disadvantage. The attorney, negotiating from a legal rather than an educational perspective, intimidates and overwhelms the educator by using legal jargon and citing case laws. (4) This leads to anger against the parent bringing the attorney, because this becomes a direct legal questioning of the educator's competencies. This can develop into quasi-teacher or administrator evaluation sessions that soon lose sight of the child's case. Perhaps competencies are an issue and need some reviewing, but this side of a child's evaluation and placement needs to be handled by the professionals.

Bringing a due process procedure into play with legal counsel represents the possibility of encountering malpractice litigation. Malpractice may be to the early 1980s what accountability was to the earlier part of the 1970s. (5) The newly found due process in special education is probably one of the highest priorities at federal, state, and local levels, because it is considered now as an important civil right. PL 94-142 and PL 98-199 spell out the types of services and programs handicapped children should receive. The IEP thus personifies the process and gives individual rights leaving no doubt that if school systems don't program appropriately, their nonconformities can represent malpractice. Educators represent a level of state governmental representation and at one time enjoyed a level of immunity from prosecution, but this halo has been dropped because of court cases such as Ayola vs. the Philadelphia Board of Education which abolished governmental immunity.

Due process has implications for wealth classes. Attorneys' fees represent $80 to $100 per hour which can only be managed by parents in middle to high income brackets. The living conditions represented in low income families may be causative factors in a child's profile which brought on the referral to special education. Since low income parents are generally not knowledgeable about school procedures, they tend to settle for the decisions of the school. This may allow poor evaluation and placement of a child to remain and never be mediated or approach due process. Therefore, a dichotomy is presented in meeting the intent of offering procedural safeguards for low

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income families because of their not being able to afford the necessary counsel. Legal aide societies can assist to some extent but are usually overworked and not always able to provide competent assistance.

If the child is truly misplaced or improperly evaluated and due process enters, the school district is obligated to keep the child in his present placement. (6) This inflexibility creates hazards that could be ameliorated through mediation.

Since the advent of the EAHCA, over 10 years of implementation has produced a plethora of opinions on similar issues throughout the states. Now it seems that the majority of cases are being found in favor of school districts based on hearing officers giving more credence to schools' data and interpretations than to what parents are providing. (7)

With all the above in mind and after having lived through seven due process hearings in five years in New York State, I would pull out all my professional competencies, escalate them, and use mediation to avoid due process surrounding placement and evaluation of special education children.

Don't View Mediation as Placation of Parents

Depending on an administrator's orientation, mediation can become a session of agreement by the administrator to all of the parents' wishes. This could be a proper sequence of events based on the child's situation. However, it should not be incumbent on the administrator to acceed to all just because a complaint is being reviewed. The win/lose attitude must not accompany mediation so that placation need not become a goal. At all times the administrator must assume an advocacy position providing he or she is professionally assured that the evaluation or placement is proper. The child must remain the central figure in the mediation, and the administrator must commit all energies to not allowing concomitant issues to intervene. If it is the building principal mediating, his or her emotions cannot generate to a level of destroying objectivity because of defending the "reputations of the staff," "professional attitudes in my building," or "our diagnostician knows what she's doing;" or placating the parents in a manner such as, "Off the record, I agree with you; he's not such a good teacher and maybe we should transfer your son to another teacher."

Perhaps a parent's challenge is merely making an attempt to see how committed the school is to its position on evaluation or placement. The mediator must use "timing, accurate listening, nonjudgmental attitudes, and avoidance of an authoritarian posture." (8) If this process is used and the parents understand that mediation is optional in solving their concerns and is not a rigorous test of the merits of their complaint, a problem-solving approach may generate with the parents participating in providing solutions. If this is accomplished by the mediator, there will not be a need for placation.

Special Education Children Aren't the Property of the Special Education Department

At times there is a pervasive feeling within a school that once an EAR meeting determines a placement of a child, an invisible responsibility train is established that leads to the Director of Special Education. It becomes

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easy for a principal to answer a parent's concerns by stating that the "committee" made the decision and that the building administrator has little control over these decisions. This creates the imperative that the building principal be an EAR committee member. If this membership is used by the principal for objective data gathering and interpretations and is a voting member of the EAR committee, the principal's possible role of mediator would be enhanced. If a principal develops the demeanor that allows for acceptance of special education as part of his or her responsibility and perceives that the Director of Special Education's office is a service unit to the individual schools, the principal will respond to mediation with a different frame of reference. Daily contact with a child's program should create an understanding that can generate trust in the principal's decision making. This is a prerequisite for conducting successful mediation. (9)

Staff and parent perceptions of special education must be directed towards the belief that regardless of a handicapping condition, the least restrictive environment concept dictates that no one in the schools develops a particular ownership of a child's education. There is a value to the required composition of an EAR committee as presented in the New Mexico Plan to provide a variety of opinions. (10) However, the principal is not named as a required member which I feel is a mistake. Without this representation clarified, the policy can still allow the Special Education Department to overwhelm the teacher and help further the feeling of separateness of programs. Parents may be led to believe that all of their dealings are with special education personnel if only these representatives are at an EAR meeting. Future mediations could be tainted by this compartmentalized approach.

Communication Breakdowns that Create A Need for Mediation

The vocabulary content of an EAR meeting either establishes comprehension of a child's evaluation and placement or leaves the participants without an educated approach in making a decision on the child. Diagnosticians seem to allow their expertise to prevail and forget to reduce technical terms to usable pieces of information. A particular learning disability can be reviewed in terms of statistics from test scores, but how learning is handicapped by these performances isn't addressed. The conclusion that "he qualifies" in our categorical approach is the one usually offered after the statistical review is given during an EAR meeting. If the committee then develops the total service plan and basic goals for the IEP with the parents present, the qualifying data might merge into a total concept of evaluation, placement, and instruction to be offered. If the EAR only places, and parental permission is granted, the parents may rethink their decision because of not knowing what will happen to their child after he is "assigned to Miss Special Education's Room." Therefore, more time should be spent in EAR meetings explaining how the child will be taught and less time on full analysis of the tests. Our advocacy must represent an interpretation to parents of how our professional approaches will assist their child in becoming a worthwhile human being and that he or she doesn't just represent a mass of scores and paperwork to the school.

Constant dialogue must take place between the regular classroom and special education teachers. Children sometimes make radical learning or behavioral changes as development progesses or factors in the environment change. Professionals dealing with the child must make instant recognition of these changes and transmit these observations to change in teaching

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strategies, ways of dealing with discipline, or possibly reviewing a placement. If various professionals lose continuity of communication, the child may sense this and develop a reaction formation to being handled differently by all the teachers. This could develop into the parents receiving negative impressions from the child and ending in a request for mediation or due process. In some cases the EAR meeting may be the only time all the child's teachers may see each other and not again until at an annual review. The building principal must structure some type of communication system for the professionals and parents to keep an ongoing process of understanding that upholds the rights for the professionals, the child, and the parents. The immediacy of answering parents' concerns cannot break down because we "are too busy." We must maintain our sensitivities to families displaying special needs, or we turn out-of-control behaviors into items of adversity. Without proper communication, a point of no return in arriving at solutions comes, and the child is forsaken. (11)

Bilingual districts have a unique set of problems in that much of the special education jargon can't be transferred from English to other languages without misrepresentation. The EAR meeting becomes more obscure to the parents because of the translations. If this occurs in minority groups, a feeling of prejudice can even emerge from this breakdown in understanding. Principals must insure that the communication is clear or mediation or due process could result, because organizations such as LULAC in the Southwest have taken greater interest in the education of Hispanics. They are informing parents of their rights and are interpreting procedures at hearings in schools.

Sometimes militancy creeps into this advocacy and administrators must learn to deal with this, because it represents years of minorities having no input into education. If principals get involved in mediation with prejudicial overtones, sensitivity to one's own prejudices must be identified and dealt with. If administrators adhere to a professional job description, they must allow their personal biases to be thwarted by the parameters of these public laws. Dealing with minorities almost places fear into mediation for those administrators not dedicated to the concept of a FAPE. Fear then makes the decisions and the rights of both the school and the child are abridged. This represents a communications breakdown that is best dealt with in training for administrators. Simulations based on a knowledge of the law, a thorough understanding of IEPs and constantly working on sensitivity training about handicaps will allow the administrator to be an effective mediator. (12)

Third Party Mediation: Its Acceptance and Use

The theme of this paper has been to contain mediation within the confines of a child's school and to avoid due process at all cost. If no resolution over placement and evaluation can be found with the building principal, a try at third-party mediation must be made--again, to head-off due process. Principals may sense a feeling of failure but are obligated to allow the Director of Special Education or another administrator to establish communications with the parent. The third party must not get into a dialogue on what transpired but must follow all the logical information gathering stages of problem solving and hope to develop resolutions or prepare the parents for due process.

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The third party technique gives mediation a semi-legal interpretation because of the impartial outside person atmosphere. The procedures to be followed are outlined in excellent fashion in the Mediation Training Package mentioned earlier in this paper. (8) All of these procedures meet the public laws needs and provide equal protection for the rights of parents, the school, and the child. If the school and parents initially agree to this process and agree on a mediator, the positive communication needed for opening mediation will be present. The procedures suggest that the mediator should always keep open communications and that this should represent the informality of the hearing. The idea of caucusing with parents and school personnel separately allows for true mediation to take place as opposed to due process procedures handing down opinions without negotation. The signing of a document by both parties, if an agreement is reached, represents the most desirable alternative in creating the best mental health and educational conditions for a child.

Conclusion

All children should have their education protected and guided with the care that is now prescribed by PL 94-142 and PL 98-199. The needs of special education children are addressed by this type of governance, and school districts in New Mexico must develop procedures to provide services that now have more parent involvement in their planning. Schools must soundly plan and actualize the plans, because more parent monitoring is being brought to the child's education through IEPs and EAR meetings. This kind of involvement allows for more discourse and brings more opinions that can lead to mediation. The principal should become the central figure in the initial mediations. It should be the building administrator's professional responsibility to prevent due process, not from the standpoint of stopping procedural safeguards for parents, but rather using less restrictive mediation techniques to bring about a continuum of instruction for the child that is free and appropriate.

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